United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1022

United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN FOREIGN STEAMSHIP CORPORATION,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL BY AMERICAN FOREIGN STEAMSHIP CORPORATION, FROM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT, AMERICAN FOREIGN STEAMSHIP CORPORATION

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO & GIUFFRA
Attorneys for American Foreign Steamship Corporation, Plaintiff-Appellant
576 Fifth Ave.
New York, N.Y. 10036
(212) 765-7100

VINCENT J. BARRA
of counsel

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Jurisdiction

This brief is submitted by plaintiff-appellant, American Foreign Steamship Corporation (hereinafter referred to as American Foreign), in support of its appeal from the Decision and Order of Honorable Murray I. Gurfein, United States District Judge for the Southern District of New York (5a). The Court below held that the defendant-appellee United States of America (hereinafter referred to as U.S.A.) was not negligent in undocking American Foreign's vessel, the S/S AMERICAN FALCON and that defendant, U.S.A. sustained the burden of proving that the striking was caused by inevitable accident caused by an act of God.

The Order and Decision of the United States District Court was entered on October 29, 1973.

American Foreign filed a Notice of Appeal from the Decision and Order on November 28, 1973 (16a). The record on appeal was transmitted to the United States Court of Appeals for the Second Circuit on January 4, 1974. The jurisdiction of this Court rests on 28 USC 1291.

Statement of Case

This appeal arises out of an admiralty action brought in the United States District Court for the Southern District of New York by appellant, American Foreign, to recover for damages sustained to the S/S AMERICAN FALCON, a vessel owned by American Foreign, as a result of being struck by a U.S. Army Tug "LT-531", owned by appellee, U.S.A. at the port of Tengan, Okinawa.

The action which was filed by American Foreign on August 14, 1972 named the U.S.A. as defendant.

On or about October 31, 1972, an Answer was filed by the U.S.A. Discovery of documents and records was made. At a final Pre-Trial Conference conducted by the trial Judge, Counsel for both parties agreed to a trial on submission of depositions and documents. The transcripts of depositions of Captain Glen Chaffin, Master of the vessel and Prentice Layton, a Pilot employed by U.S.A. were submitted in evidence.

On October 29, 1973, the District Court filed its opinion which held U.S.A. was not responsible for striking the FALCON and the consequent damages thereto. Judgment was entered in favor of defendant-appellee, U.S.A. on December 18, 1973, dismissing the complaint (15a). A Notice of Appeal was filed on November 28, 1973. The record on appeal was transmitted to the United States Court of Appeals for the Second Circuit on January 4, 1974.

Issue Presented for Review

1. Whether defendant-appellee, U.S.A. has sustained its burden of proving that the circumstances of the striking was an inevitable accident caused by an Act of God and was U.S.A. free from any fault contributing to striking and consequent damages to S/S AMERICAN FALCON.

Summary of Argument

American Foreign does not dispute the findings of facts by the trial Court. In fact, American Foreign considers said findings a comprehensive and accurate factual account of the striking at Tengan, Okinawa on September 5, 1970.

However, American Foreign contends that the conclusions by the trial Court were clearly erroneous, as U.S.A. failed to sustain its burden of proof that the striking was caused by an "inevitable accident" or Act of God. It is further submitted that the Court below erroneously decided that U.S.A. was not negligent in failing to provide tugs when the wind was slight and thereby unreasonably delaying departure of the FALCON until the storm was at its height.

American Foreign does not now, nor during the trial in the District Court, contend that the Pilot or tugs were negligent *during the actual undocking*. It was the unreasonable *delay in furnishing* the Pilot and tugs that American Foreign contends was inexcusable, and negligence on the part of the U.S.A.

The cumulative proof submitted was that U.S.A. was requested to furnish tugs as soon as possible, that it knew of the oncoming typhoon and dangerous circumstances surrounding the vessel, yet U.S.A. unduly delayed furnishing tugs until the storm struck with all its fury (9a).

Moreover, U.S.A. having the responsibility and burden of proof to show inevitable accident, failed to introduce any evidence whatsoever that tugs reasonably could not have been made available until seven hours after they were ordered.

Statement of Facts

On September 5, 1970, at Port of Tengan, Okinawa, the FALCON was struck by a United States Government Tugboat, causing damage to its hull structure. The FALCON was under Time Charter to the defendant, United States of America, to carry cargo to various ports including Tengan, Okinawa (6a).

The day prior to the striking, September 4, 1970, the weather worsened and a typhoon was approaching Okinawa from the southeast (8a). The FALCON was docked, port side to, at Tengan Pier, Okinawa, on the morning of September 5, 1970 (6a). At or about 0400 (4:00 a.m.) there was a gentle breeze from the northeast at approximately fifteen (15) miles per hour. The weather conditions began to worsen during the morning of September 5th, while the FALCON was discharging its cargo under the direction of the charterer, U.S.A. (8a).

Captain Chaffin, Master of the FALCON became concerned with the worsening weather and at about 0900 (9:00 a.m.) telephoned the Harbormaster of Tengan and requested extra wire mooring lines to protect the vessel from increasing winds, or alternatively, that the vessel be permitted to sail as soon as possible (8a). Harbormaster directed Captain Chaffin to await further instructions. Shortly thereafter, a U.S. government pilot, Prentice Layton, an employee of the U.S.A., observed the FALCON at Tengan Pier. Pilot Layton, concerned for the safety of the vessel because of the worsening weather and approaching typhoon, went aboard the FALCON at 0930 (9:30 a.m.)

to confer with her Captain. Pilot Layton had just undocked another vessel at Buckner Bay and was aware of the typhoon through weather reports and, in his words, by simply observing the weather conditions about him. After a brief discussion between Pilot Layton and the Captain of the FALCON, both men agreed that the correct procedure was to clear the vessel from the exposed Tengan Pier and head for the open sea as soon as possible (9a). At this time, it would have taken the crew one hour to secure the FALCON properly for sea (9a). Together, Captain Chaffin and Pilot Layton telephoned the Harbormaster of Tengan harbor and requested that in view of the emergency weather conditions, the FALCON should be moved from Tengan Pier to the open sea as soon as possible (9a). The Harbormaster advised them that the necessary tugs would not be available until 1600 (4:00 p.m.) but gave no reason why said tugs could not be furnished as requested by the Pilot and Captain Chaffin. Pilot Layton remained on board the vessel for a considerable length of time and finally left at approximately 1130 (11:30 a.m.) to wait in his office for the arrival of the tugs at Tengan Pier (9a).

The port of Tengan, Okinawa, is a U.S. government installation and is completely controlled by the Harbormaster and other employees of the U.S.A. (6a). Pilots are compulsory for the navigation of vessels, such as the FALCON, in an out of Tengan and all of the pilots are employees of the U.S.A. (6a). On September 5, 1970, the U.S.A. contractually agreed to furnish the necessary pilot and tugs to undock the FALCON. It is essential that tugs be utilized in the undocking operation and the only tugboats available to the FALCON for the undocking are owned, operated and controlled by the U.S.A. (6a).

The port of Tengan is not operated in the traditional manner as most commercial ports throughout the world. Simply, the port of Tengan is under the complete control

of the U.S. government and all vessels within its waters are completely controlled by the U.S. government and its employees (7a). All weather information, reports and warnings are furnished to personnel on the island of Okinawa by Kaden Air Base weather station which is operated and controlled by employees of the U.S.A. (7a). Commencing at 0900 (9:00 a.m.) the FALCON could have been sufficiently manned, battened down and secured to proceed to sea with only one hour notice. At 12:00 the wind was relatively slight and continued so for a period of more than two hours (10a). The FALCON could have undocked and proceeded to sea with relative ease during this period. The wind continued to increase throughout the day and at 1630 (4:30 p.m.) when the tugboats finally arrived to undock the FALCON, the wind was near gale force.

Due to the exposed nature of Tengan pier and the existing weather conditions, two large tugs would have been necessary to safely undock the FALCON. The Harbormaster supplied one large tug and one small tug to undock the vessel. Due to the wind and sea conditions the smaller tug was totally useless and forced to standby at a distance and observe the undocking operations (12a). Another large tug ("LT 579") was available on the island of Okinawa but was not furnished by the Harbormaster.

The large tug assisting in the undocking operations was the "LT 531". This tug was able to hold the FALCON for a time but as the wind and sea increased in ferocity, the tug "LT 531" lost control of the vessel and struck the hull of the FALCON causing extensive damage. Undocking of vessels at Tengan creates problems more complex than those encountered at other harbors on Okinawa because of the exposed pier and surrounding reefs. This situation becomes more complex in severe weather conditions, thereby necessitating the use of two large tugs to assist in the undocking.

Captain Chaffin of the FALCON and Pilot Layton requested the Harbormaster early in the morning of September 5, 1970 to furnish the tugs necessary to undock the vessel as soon as possible (8a). The Harbormaster directed that tugs would not be furnished until 1600 (4:00 p.m.) when all U.S. government cargo had been discharged. The larger tug, "LT 531", which assisted in undocking the FALCON, was at Buckner Bay, another harbor on the island of Okinawa on the morning of September 5, 1970. In fact, at 0842 (8:42 a.m.) on the morning of September 5th, the tug "LT 531" had finished assisting Pilot Layton in undocking another vessel at Buckner Bay (10a). Throughout the morning, the tug "LT 531" remained at Buckner Bay awaiting instructions from the Harbormaster. Tug "LT 531" did not engage in any other docking or undocking operations at Buckner Bay after 0842 (8:42 a.m.) on September 5, 1970 as the only other vessel moored at Buckner Bay did not depart until the next morning. "LT 531" did not depart from Buckner Bay until 1330 (1:30 p.m.). This was some four (4) hours after Pilot Layton and Captain Chaffin submitted an emergency request to the Harbormaster for tugboats. An extract from the log book of the tug "LT 531" does not indicate any entries before 1100 (11:00 a.m.) but does show that the tug was not engaged in any activity from 1100 (11:00 a.m.) (3a). "LT 531" consequently arrived at Tengan Pier at 1630 (4:30 p.m.) when the typhoon was approaching its full fury (12a).

The FALCON was ready to sail at 1200 (noon), the pilot was available and the only missing ingredient was the tugboats. The wind and sea were slight at 1200 and remained so until approximately 1500 (3:00 p.m.). The SS "AMERICAN FALCON" could have been undocked with relative ease during this period. Instead, the two tugboats, one of which was totally useless, did not arrive until 1630 (4:30 p.m.) when the storm hit with all its intensity.

POINT I

U.S.A. was negligent in failing to take prompt action in undocking American Foreign's vessel in view of approaching typhoon.

U.S.A. contractually agreed to furnish the tugboats necessary to undock the SS AMERICAN FALCON on September 5, 1970 at Tengan, Okinawa (7a). Appellee, U.S.A. has a duty, therefore, to exercise reasonable skill, care, and diligence in performing the services contracted for. *The Bronx,* 14 F.2d 482 (E.D.N.Y. 1926).

Implicit in such a duty is the obligation of the U.S.A. to perform said services with reasonable dispatch considering the circumstances involved. The findings of fact by the Court below clearly held that the employees of the U.S.A. were all aware of this impending storm (7a, 8a). The weather was worsening throughout the day. Pilot Layton, who was assigned to undock the FALCON, was fully aware of the gravity of the situation (8a). Both he and Captain Chaffin requested the Harbormaster to furnish the necessary tugs as soon as possible in order to get the vessel out to sea. This request was made at 0930 (9:30 a.m.) on the morning of the striking (8a). According to Pilot Layton, an employee of U.S.A., everyone was aware of the emergeny situation and the fate awaiting the FALCON if she remained tied to the exposed pier at Tengan when the typhoon hit with all its fury.

That is the reason both Pilot Layton and Captain Chaffin wanted the vessel undocked as soon as possible. The U.S.A. contends that Captain Chaffin agreed to sail the vessel at 1600 (4:00 p.m.). This is nonsense. The trial judge found that Captain Chaffin requested, along with Pilot Layton at 0930 (9:30 a.m.), that the vessel be permitted to sail as soon as possible (8a).

The operation at Tengan, Okinawa should be explained in order that the Court may appreciate the situation. The

island of Okinawa, including the port of Tengan, is a U.S. government installation, completely operated and controlled by the U.S. Army and civilian government employees (6a). No vessel may move in or out of Okinawa without the authorization of the U.S.A. Pilots are compulsory and vessels cannot dock or undock without the assistance of tugboats. All tugboats are owned, operated and controlled by the U.S.A. (7a).

The Captain of the SS AMERICAN FALCON requested authorization to sail as soon as possible after 0930 (9:30 a.m.). The Harbormaster ordered that the vessel was to sail at 1600 (4:00 p.m.) and that tugs would not be furnished until 1600 (4:00 p.m.). How could the FALCON sail without tugs? The Captain of the FALCON requested, at 0930 (9:30 a.m.), that his vessel be permitted to sail forthwith. The Harbormaster did not grant this request and scheduled the sailing for 1600 (4:00 p.m.).

It should be pointed out that the U.S.A. was concerned with completing the discharge of its cargo before the FALCON left Tengan. The U.S.A. chartered the FALCON and was carrying its own cargo for discharge at Tengan (6a). If the FALCON sailed early on September 5th before completion of discharge, the vessel would have had to return to complete discharging. This would have resulted in additional expense to the U.S.A. and delay in receiving all its cargo. Obviously, employees of the U.S.A. hoped to complete all discharging and sail the vessel before the storm struck. They guessed wrong!

The Captain of the FALCON was primarily concerned with the safety of his vessel and, therefore, requested immediate sailing. The Captain testified and the Lower Court so found that if he had been furnished with the necessary tugs, the vessel could have been sufficiently manned, battened down and secured to proceed to sea with one hour notice (9a). The vessel could have sailed while the wind and sea were slight; rode out the storm at sea and returned

to complete discharging its cargo for Tengan. Although burden of establishing negligence is initially on the plaintiff, there is an obligation on defendant for some satisfactory explanation when a striking occurs during an undocking which ordinarily does not result in such a casualty. *Bisso* v. *Waterways Transportation Company,* 235 F.2d 741 (5th Cir. 1956).

The U.S.A. contends that tugs were not available until 1600 (4:00 p.m.). However, the U.S.A. has not produced a scintilla of evidence to show that tugs were not available until that time. The trial judge found in his finding of fact No. 37 (11a) that:

> "There is insufficient evidence to establish that tug 'LT 531' was available to leave Buckner Bay to assist in the undocking of the SS AMERICAN FALCON from 0842 on September 5, 1970 (Layton Notebook Exhibit 3)"

The lower Court erred in its conclusion that plaintiff, American Foreign must show sufficient evidence as to availability of tug "LT 531". This burden is clearly on U.S.A. as elaborated in Point II of this brief.

The only indication of such unavailability was a general statement made to Pilot Layton and Captain Chaffin by the Harbormaster. The records, on the contrary, indicate that tug "LT 531" was available from 0842 (8:42 a.m.) (10a) but was not furnished until 1630 (4:30 p.m.). Pilot Layton stated that the "LT 531" was at Buckner Bay earlier that morning. His notebook (Exhibit 3) indicated that this undocking was completed at 0842 (8:42 a.m.). After Pilot Layton undocked the vessel at Buckner Bay, he proceeded to Tengan and went on board the FALCON. The "LT 531" remained at Buckner Bay. There was only one other vessel docked at Buckner Bay and she did not sail until the next morning (10a). Shortly after 0930 (9:30 a.m.) Pilot Layton and Captain Chaffin requested that the

necessary tugs be furnished as soon as possible. Tug "LT 531" was standing by awaiting instructions from 0842 (8:42 a.m.). It was not until 1330 (1:30 p.m.) that the "LT 531" left Buckner Bay to assist the FALCON (3a).

The log extract of the tug "LT 531" does not indicate any of the entries made before 1100 (11:00 a.m.) on September 5, 1970. However, the log entries clearly confirm that tug "LT 531" was merely standing by from 1100 (11:00 a.m.) until its departure at 1322 (1:22 p.m.) (3a). Even if the tug had left at 1100 (11:00 a.m.) it would have arrived at Tengan pier with sufficient time to assist in the undocking of the S/S AMERICAN FALCON before the typhoon struck.

Why did the tug fail to leave Buckner Bay until some four (4) hours after the request was made by Pilot Layton and Capain Chaffin for the services of the tugs? The U.S.A.'s response is simply that the "LT 531" was not available until 1600 (4:00 p.m.) although Pilot Layton's notebook indicates that "LT 531" was available from 0842 (8:42 a.m.). The U.S.A. contractually agreed to supply the necessary tugs within a reasonable time (7a). When such tugs were not made available with reasonable dispatch, the burden is on U.S.A. to explain *why* the tugs were delayed in performing their contractual responsibility.

The Judge in the District Court held that the weather did not worsen to any extent from 1600 (4:00 p.m.), the scheduled time for sailing, to 1630 (4:30 p.m.), the actual time of arrival of the tugs (14a). This is totally irrelevant. The crux of American Foreign's contention is that the tugs should have been furnished as soon as possible after requested by Pilot Layton and Captain Chaffin at 0930 (9:30 a.m.). Pilot Layton and Captain Chaffin realized the gravity of the situation. If their request had been expedited promptly the "LT 531" would have arrived to assist the FALCON at or about 1230 (12:30 p.m.)

when the wind was slight and the FALCON could have been undocked with relative ease. If proper attention had been given to the warnings of man and nature, the damages sustained by the FALCON could have been avoided. *The Bronx, supra.*

The facts of the case herein are similar to the decision in *New York Trap Rock Corporation* v. *Christie Scow Corp.*, 68 F.Supp. 392 (E.D.N.Y. 1946), wherein owners of a tug were held negligent for failing to move a scow from a slip which became dangerous due to severe weather conditions. The decision states in pertinent part:

> "The weather was bad enough on the 23rd, and there is evidence showing that Moran should have realized that the scow was berthed in a dangerously exposed berth in case of a northwest storm, which would naturally cause heavy swells in the slip.
>
> To be sure, when this weather condition, evident on January 23rd, finally built up to its greatest intensity late in the day of January 24th, it may have been too late, because of the storm and the freezing temperature, to save the scow and possibly this fact is now relied on by Moran to exculpate itself from a situation caused by the failure to previously exercise reasonable care for the safety of the scow. . . . The location and possible danger of this berth for the scow was known to Moran, or reasonably should have been. Likewise, was the condition of the weather . . . it was negligence on the part of Moran not only to place her as he did, in this exposed slip under the prevailing weather conditions, but the following afternoon he was repeatedly notified of the increasing danger to the scow and apparently did nothing during all this time when something could have been done to rescue the scow from her danger.
>
> Witnesses testified that these notices were given to Moran on several occasions from 3 o'clock in the

afternoon until 5:30 and during those hours, witness testified that the scow was still 'in good condition' (Anastasia) 'up to 4'clock it was very easy to take the scow away. I have seen the weather rougher than that'. 'The scow was all right when I left at 6 o'clock, a little bit down by the stern—about a foot. She still had a couple of feet of freeboard.' (Susino)

It was, therefore, in my opinion, the failure to use reasonable care on the part of Moran to leave this scow, under all the above circumstances, to the mercy of the storm that finally sank her."

Further, in the Second Circuit decision, *McAllister Bros., Inc.* v. *Pennsylvania Railroad Co.*, 118 F.2d 45 (2nd Cir., 1941), the Court held a tug owner negligent in failing, both before and after storm warnings were received, to move a barge from a pier which was not safe in view of severity of the storm.

The Court in *Seaboard Sand and Gravel Corporation* v. *Elmhurst Contracting Co., Inc.*, 68 F.Supp. 169 (E.D.N.Y., 1946) also held a tug owner negligent in failing to heed storm warnings and take proper precautions to remove a vessel moored at a dangerous pier. Judge Kennedy refuted defendant's contention that no tugs were available and cause of damage was due to the severe weather, stating:

"On the issue of due care, Elmhurst's principal contention is that while it had had storm warnings, it had no cause to anticipate a storm of such violence, and that if the piers to which the floating equipment was moored were exposed to storms, and remote from safe anchorage, the charterer has impliedly consented to these risks—that they would normally be incurred in operations in that locality. I am not persuaded by any of these arguments. The respondent Elmhurst had

notice of severe weather to come, and I believe the precautions it took were inadequate. Since the respondent was in active charge of the operations in that locality, and was on notice of the conditions, as well as of the approaching storm, I believe it did not discharge its duty of due care, and that its negligence has been established by the entire record. I say this wholly independently of the fact that respondent was not even clear about the location of libelant's scow when the storm broke.

If Elmhurst is to escape liability on the theory of inevitable accident, then surely it must establish by convincing proof that the disaster was brought about by causes beyond the control of anyone. This it has not done in this case."

It is not disputed and court below so held that the U.S.A. was aware of the approaching storm (8a, 9a). Clearly, Pilot Layton, one of the U.S.A.'s own employees, was fully aware of its approach and the grave situation that faced the FALCON if the storm struck while the vessel was still moored at the exposed Tengan Pier (8a). U.S.A. offers no explanation why it waited four (4) hours before the tug "LT 531" left to assist the FALCON.

Clearly, on the evidence, the U.S.A. was negligent in failing to take *prompt* action in removing the SS AMERICAN FALCON which was not safe in view of the severity of the weather. U.S.A. is therefore liable for the damages sustained to the SS AMERICAN FALCON.

POINT II

U.S.A. has not sustained its burden of proving inevitable accident.

The U.S.A.'s only defense in the action herein is that damage sustained to the FALCON could not be avoided due to the severe weather conditions existing at the time of un-

docking. American Foreign has clearly shown negligence of the U.S.A. in Point I. In any event, the burden of proving an "inevitable accident" due to an Act of God i.e. a typhoon, is squarely placed on the U.S.A. The trial judge below concluded that the U.S.A. had sustained its burden of proving "inevitable accident" (15a). The District Court holding that the U.S.A. has established its freedom from fault because of an "Act of God", is clearly erroneous.

"Inevitable accident" does not mean one which was physically impossible for U.S.A. to have prevented. "Inevitable" has been defined over the years, as accident "that would not have occurred by the use of that degree of reasonable care and attention which the situation demanded." *The Lackawanna,* 210 Fed. 262 (2nd Cir. 1913), Griffin on Collision, § 236 at pg. 537.

A person may not allege that a situation was unavoidable if said person failed to act reasonably in avoiding such a situation. U.S.A. herein, is probably correct in its contention that Pilot Layton did nothing wrong in undocking the vessel under the severe weather conditions with one tug. It was the failure of U.S.A. *to act promptly* in furnishing the tugs that American Foreign contends was negligence on part of U.S.A. The unnecessary delay of several hours in furnishing tugs necessitated the undocking of the FALCON to take place when the typhoon struck with all its fury. The Court below found that U.S.A. had numerous warnings of the approaching storm but did not take swift action (8a, 9a). Even the warnings of Pilot Layton went unheeded by U.S.A. until it was too late.

The burden of proving "inevitable accident" is *heavily* upon the party asserting such defense and a finding of "inevitable accident" is not to be lightly arrived at. *Trawler Jeanne D'Arc, Inc.* v. *Casco Trawlers, Inc.,* 260 F. Supp. 124 (1966), *Hedger* v. *Tug John D. Schoonmaker,* 122 F. 2d 312 (2nd Cir. 1941). As stated by Judge Hand in *The Hylas,* 1925 A.M.C. 921, 925, defendants asserting de-

fense of "inevitable accident":

> "Must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required."

U.S.A. has contended and District Court agreed that since the storm was approaching its full fury *at the time of undocking,* the striking could not be avoided under such conditions (15a). U.S.A. attempts to substantiate this contention solely on the hearsay statement that the Harbormaster advised Pilot Layton that tugs were not available for many hours and the two tugs furnished were the only ones available. Is this sufficient to sustain U.S.A.'s burden of establishing the defense of inevitable accident? We think not. The evidence on the contrary establishes the availability of necessary tugs for many hours before they were ultimately furnished by the U.S.A.

Certainly the information dealing with the question as to why the appropriate tugs were not timely furnished is exclusively within purview of U.S.A. U.S.A. has not produced the Harbormaster, manifestly an important witness, or any other witnesses to confirm that indeed it did everything reasonable under the circumstances. If any inference should be drawn from this, it is that Harbormaster could *not* confirm that U.S.A. acted seasonably and with due care.

The decision in *Seaboard Sand & Gravel Corporation* v. *Elmhurst Contracting Co., Inc., supra,* reiterates the rule that:

> "If Elmhurst is to escape liability on the theory of inevitable accident, then surely it must establish by convincing proof that the disaster was brought about by causes beyond the control of anyone. This it has not done in this case."

When damage is caused by high wind and severe weather conditions, defense of "inevitable accident" is allowed only

if it appears that force of wind could not be anticipated and person asserting the defense had no warning of such conditions. In *The Bronx, supra,* Judge Campbell set forth in his opinion that although a severe gale was blowing at the time of the incident,

> "The claim that the parting of the lines was due to inevitable accident was not, in my opinion, sustained, because the wind did not rise suddenly, with but little warning, but, on the contrary, continued to rise gradually for several hours before it reached its height and, if proper attention had been given to those warnings, one of the claimant respondent's tugs, which were at College Point, could have gone to the assistance of the boats at the stake boat, and the damages suffered by the Empire No. 14 could have been prevented, either by moving the boats or by placing them on separate lines to the stakeboat."

U.S.A. has not submitted a scintilla of evidence to sustain its burden of proving "inevitable accident".

CONCLUSION

The decision of the Court below holding the U.S.A. without fault and that striking was caused by inevitable accident should be reversed and judgment should be entered in favor of American Foreign.

Respectfully submitted,

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO
& GIUFFRA
Attorneys for
American Foreign Steamship Corporation,
Plaintiff-Appellant

VINCENT J. BARBA
of counsel